Office Supreme Court, U.S.
FILED
AUG 31 1983
ALEXANDER L. STEVAS
CLERK

NO. 83-145

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

AMERICAN FAMILY LIFE
ASSURANCE CO.,
Petitioner,

v.

PETER HIAM,
Commissioner of Insurance,
Respondent.

On Petition For A Writ Of
Certiorari To The Massachusetts
Supreme Judicial Court

RESPONDENT COMMISSIONER OF INSURANCE'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

THOMAS R. KILEY
First Assistant
Attorney General
Counsel of Record

STEPHEN S. OSTRACH
THOMAS A. BARNICO
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
(617) 727-1033

QUESTION PRESENTED

Should this Court grant plenary review of a decision by a state court that a regulation restricting sale of one specific type of health insurance was authorized by state law and was neither arbitrary nor capricious?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD BE DENIED	4
I. THE DECISION BELOW DOES NOT AFFRONT AMERICAN'S SUBSTANTIVE DUE PROCESS RIGHTS.	6
II. THE REGULATION DOES NOT DEPRIVE AMERICAN OF A PROPERTY INTEREST WITHOUT PROCEDURAL DUE PROCESS.	12
III. THE PROCEDURES FOR JUDICIAL REVIEW IN THE MASSACHUSETTS COURTS DID NOT DENY AMERICAN DUE PROCESS.	16
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
Arnett v. Kennedy, 416 U.S. 134 (1974)	15n
Bishop v. Wood, 426 U.S. 341 (1976)	15
Board of Regents v. Roth, 408 U.S. 564 (1972)	15
Hammerstein v. Superior Court, 341 U.S. 491 (1951)	5n
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)	19n
In Re Woods, 143 U.S. 202 (1892)	5
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	14
Massachusetts State Pharmaceutical Ass'n v. Rate Setting Commission, 387 Mass. 122, 438 N.E. 2d 1072 (1982)	17
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)	9,10,11n,19n
United States v. Carolene Products Co., 304 U.S. 144 (1938)	10

Page

Vance v. Bradley, 440 U.S. 93 (1979) 19n

Wade v. Mayo, 334 U.S. 672 (1948) 5n

Federal Statutes and Regulations

5 U.S.C. §706(2)(A) 8n

15 U.S.C. §1011 6n, 16n

15 U.S.C. §1012 16n

Massachusetts Statutes and Regulations

G.L. c. 30A, §14(7)(G) (West) 8n

G.L. c. 175, §108(2) (West) 13

G.L. c. 175, §110E (West 1983-1984 Cum Supp.) 10n

Mass. St. 1973, c. 1084 10n

211 Code of Massachusetts Regulations 47.00 3

NO. 83-145

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

AMERICAN FAMILY LIFE
ASSURANCE CO.,
Petitioner,

v.

PETER HIAM,
Commissioner of Insurance,
Respondent.

On Petition For A Writ Of
Certiorari To The Massachusetts
Supreme Judicial Court

RESPONDENT COMMISSIONER OF INSURANCE'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Pursuant to United States Supreme Court Rule 22, the Commissioner of Insurance for the Commonwealth of

Massachusetts ("the Commissioner"), defendant in the proceedings before the Massachusetts Superior Court and successful appellant before the Massachusetts Supreme Judicial Court, submits this brief in opposition to the petition for a writ of certiorari to the Supreme Judicial Court filed by the American Family Life Assurance Company ("American").

In early 1983, Peter Hiam succeeded Michael Sabbagh as Commissioner of Insurance. In accordance with Supreme Court Rule 40.3 he is substituted as defendant-respondent in his official capacity.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 34.2, the Commissioner submits the following

supplemental statement of the case. The statement is drawn from the decision below which is printed as Appendix B to the Petition. In 1979, the respondent's predecessor promulgated a regulation, 211 Code of Massachusetts Regulations 47.00 et seq., which has the effect of restricting future sales of "specified disease insurance"[1/] in Massachusetts.[2/] B. 2. The petitioner, American Family Life Assurance Company ("American"), which had been lawfully selling such insurance

---

1/ "Specified disease insurance" is health insurance which covers medical costs resulting only from the diseases or conditions specified in the policy. It bears the same relation to comprehensive medical insurance as airport vending machine flight insurance policies bear to ordinary life insurance.

2/ The regulation does not apply to previously sold policies or renewals. It applies only to new sales to new customers. B. 2.

in the Commonwealth, challenged those regulations in the state Superior Court. B. 1. A Superior Court judge invalidated the regulation as beyond the respondent's power under state law and as arbitrary and capricious. B. 1.[3/] The Commissioner appealed to the Supreme Judicial Court which reversed the Superior Court judgment and held that the regulation was within the Commissioner's statutory authority, was not arbitrary or capricious, and was not unconstitutional. B. 1-14.

REASONS WHY THE WRIT SHOULD BE DENIED

As provided in Rule 17 of the Rules of this Court, "[a] review on writ of

---

3/ There is no basis in the record for American's unsupported claim (petition at 12) that the Superior Court invalidated the regulation as "unconstitutional."

certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor." The purpose of the Congressional grant of certiorari jurisdiction to this Court is to permit it to select cases "of such gravity and general importance" as to warrant review of the decision below. In Re Woods, 143 U.S. 202, 206 (1892).[4/] This case does not raise any "special or important" issues of federal significance that warrant certiorari review. Rather it involves narrow questions of state insurance law, a subject about which Congress

---

4/ See also Hammerstein v. Superior Court, 341 U.S. 491, 492 (1951) (". . . issuance of the writ is discretionary"); Wade v. Mayo, 334 U.S. 672, 680 (1948) ("[w]rits of certiorari are matters of grace.").

has said "continued regulation by the several states . . . is in the public interest."[5/]

I. THE DECISION BELOW DOES NOT AFFRONT AMERICAN'S SUBSTANTIVE DUE PROCESS RIGHTS.

American's first[6/] argument is that the Supreme Judicial Court erred in holding that the Superior Court failed to find facts sufficient to constitutionally invalidate the regulation. Pet. at 20. This awkwardly phrased claim, however, is really nothing more than a new

---

5/ 15 U.S.C. §1011 (McCarran-Ferguson Act).

6/ Actually American's first argument is that the decision "denies to the petitioner the right to effectively challenge the constitutionality . . ." of a regulation. Pet. at 17. However, this argument appears to be no more than a summary of the more specific arguments American makes subsequently in the petition.

version of the long-dead doctrine of substantive due process. This identity emerges at several points in the petition,[7] and in view of the current vitality of substantive due process claims in the sphere of economic regulation,[8] this alone might dispose of this claim.

The first error in American's approach is that the syllogism upon which it relies, "arbitrary, capricious and

---

7/ E.g. Pet. at 17 (". . . the Supreme Judicial Court in making its substantive due process analysis, i.e. in addressing the problem of whether or not the regulation was arbitrary, capricious or unreasonable . . ."); id. at 16 ("plaintiffs had alleged the regulation . . . was arbitrary, capricious and unreasonable, and therefore in violation of the due process clause . . .") (emphasis supplied).

8/ This case does not involve protected personal constitutional rights such as those under the First Amendment which are, of course, substantively protected through the Due Process Clause of the Fourteenth Amendment.

unreasonable, and therefore in violation of the due process clause . . .," Pet. at 16, is simply not the law. American offers no citation for this conclusion and the respondent is aware of none in the past half century. Claims of arbitrary and capricious administrative action are, of course, the daily grist of administrative[9/] not constitutional law. If American's proposition were to become the law, every attack on any action by a state officer would be converted into a constitutional claim. The resulting wholesale transfer of proceedings from the state to federal courts would eliminate any remaining vestiges of federalism in our judicial system.

9/ See, e.g., Mass. Gen. Laws Ann. ch. 30A, §14(7)(g) (West); 5 U.S.C. §706(2)(A) (Administrative Procedure Act).

American's proposition is thus not only wrong, but also unworkable.

The proper mode of substantive constitutional review of a state regulation such as that challenged here was recently outlined by the Court in Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456 (1981). Clover Leaf, although ignored by American, presents considerable similarities to this case and is dispositive on this issue. In both Clover Leaf and this case the challengers attempted to prove at trial that, as an empirical matter, there was no rational connection between "legitimate" legislative purposes and the particular means chosen to achieve them. Id. at 462-63.[10/] In

---

10/ Although not reproduced in Petitioner's Appendix, the statute relied

(footnote continued)

Clover Leaf the Court held that such constitutional review does not focus on whether the state's choice of means is "sensible" (449 U.S. at 469) but only on whether it has been shown not to be rational. So long as "the question is at least debatable," the state's action must be upheld. United States v. Carolene Products Co., 304 U.S. 144, 154 (1938); Clover Leaf, 449 U.S. at 469.

Here, the rationality of the Commissioner's[11/] decision to adopt

---

(footnote continued)

upon by the respondent, Mass. G.L. c. 175, §110E (West 1983-1984 Cum. Supp.) as added by Mass. St. 1973, c. 1084, furthers "legitimate state purposes" such as "elimination of deceptive [sales] practices". The Supreme Judicial Court held that the statute empowered the Commissioner to issue the challenged regulation. B. 7, B. 9.

11/ American argues (Pet. at 30-31) that it was error for the Supreme Judicial

(footnote continued)

the challenged regulation as a means of achieving the legislative goals is discussed in the Supreme Judicial Court's opinion. The Court discussed the trial record and concluded it did not demonstrate that the regulation lacked any conceivable basis. B. 11. In particular, the Court noted that the challengers had offered no evidence whatsoever addressing the Commissioner's conclusion

---

(footnote continued)

Court to afford the same presumption of validity to the Commissioner's regulation as is normally given to a statute. Except for one plainly out of context quotation from a recent federal case, American cites no authority. Once again Clover Leaf is dispositive: ". . . the states are free to allocate the lawmaking function to whatever branch of state government they may choose." 449 U.S. at 461 n. 6. The "standard of review under . . . rationality analysis [is] without regard to which branch of the state government has made the legislative judgment . . ." Id.

that the regulation might cure existing abuses in specified disease insurance sales tactics such as exploitation by sellers of irrational public fears of cancer or other diseases. B. 10-11. In view of the failure of American even to offer evidence on that point, the rationality of the regulation as a means to achieve the legislative goal is "at least debatable" and so the Supreme Judicial Court properly declined to substitute its judgment for that of the respondent.

II. THE REGULATION DOES NOT DEPRIVE AMERICAN OF A PROPERTY INTEREST WITHOUT PROCEDURAL DUE PROCESS.

American's second argument is that the adoption of the regulation deprived it of property without due process. Pet. 23-28. Once more, American ignores settled law. Its claim is frivolous.

The "property" claimed by American is the "right" to use certain policy forms to sell insurance in Massachusetts. To sell insurance in Massachusetts, not only must a company be approved by the Commissioner, but any specific policy form it proposes to use must also be approved before any contracts using that form can be made. Mass. G.L. ch. 175, §108 (2) (West). Prior to promulgation of the regulation, American was selling specified diesease insurance via two approved forms. The effect of the regulation was to prevent any further new sales using those two forms.[12/] No "property" of American was taken.

12/ The forms embodied policies covering only the risk of cancer. The regulation banned any single disease insurance so at a minimum American would have to draft, and have approved, new forms that

(footnote continued)

As the Supreme Judicial Court said: "[American's] interest is in future sales to new purchasers of previously approved policies. This is not a property interest the deprivation of which requires a hearing to satisfy due process." B. 14. That conclusion is plainly correct. More importantly, it is a decision on a matter committed to state determination. As this Court has emphasized: "The hallmark of property . . . is individual entitlement grounded in state law . . ." Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) (emphasis added). Thus the essential predicate of a procedural due

---

(footnote continued)

cover the risk of cancer and the other eleven conditions addressed in the regulation. Of course, existing insurance contracts made pursuant to those forms were not affected by the regulation, nor was American's right to renew such existing contracts. B. 2.

process claim such as that raised here--the existence of a property interest--is the question whether as a matter of state law the holder of the interest in question has a sufficient entitlement to constitute "property" for constitutional purposes. See, e.g., Bishop v. Wood, 426 U.S. 341, 344 (1976); Board of Regents v. Roth, 408 U.S. 564, 577 (1972).[13/] The final decision on that state law question is, of course, normally reserved for the state supreme court. See, e.g., Bishop v. Wood, 426 U.S. at 345. Here that state court has unambiguously held that state law does

---

13/ For example, the quotation from the concurrence in Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (which American mistakenly refers to as the majority opinion, Pet. at 27, 28) provided in the Petition at 27 is immediately followed by "[w]hile the legislature may elect not to confer a property interest . . ."

not recognize a property right of the type claimed by American. B. 14. That conclusion disposes of the procedural due process claim.[14/]

III. THE PROCEDURES FOR JUDICIAL REVIEW IN THE MASSACHUSETTS COURTS DID NOT DENY AMERICAN DUE PROCESS.

American had a seven day trial in Superior Court on its claims. Pet. at 20. The decision of the Supreme Judicial Court demonstrates that not only was American able to offer any evidence it wished, it was obliged to do so lest its

---

14/ This point is particularly true in the insurance area since in the McCarran-Ferguson Act Congress has unambiguously announced a federal policy that regulation shall remain in the hands of the states. 15 U.S.C. §§1011, 1012. Ignoring state court conclusions on the entitlement created by approval of policy forms by state officers would obviously undercut that Congressional policy.

challenge might fail. B. 10. (Plaintiff has burden of "proving on the record" regulation is irrational); see also Massachusetts State Pharmaceutical Ass'n v. Rate Setting Commission, 387 Mass. 122, 127, 438 N.E. 2d 1072, 1075-76 (1982) (unlawfulness of a regulation must be shown in the judicial proceeding).

American's argument that it was "forbidden at the trial of the case in the trial court to introduce in support of their position any evidence from the record of the hearing before the Commissioner . . .", Pet. at 32, is simply not true. As the Superior Court decision states "both American and Union resisted all efforts of the defendant [Commissioner] to introduce the record of the [administrative] proceeding." A. 68

(emphasis in original). It was on that basis that the Superior Court excluded the evidence American now claims it was prevented from offering. That exclusion, which the Supreme Judicial Court later indicated was in error, B. 6 n. 6, was thus a victory (albeit temporary) for American and not a defeat of which it can now complain.

In any event the Supreme Judicial Court's opinion demonstrates that in Massachusetts, evidence of the course of administrative proceedings is admissible in judicial review proceedings, B. 6 n. 6, and so American's claim is without merit. American received a full opportunity in the Superior Court to introduce whatever evidence it chose. Its procedural due process rights were fully

protected.[15] American had a fair chance to challenge the regulation; it simply did not prevail.

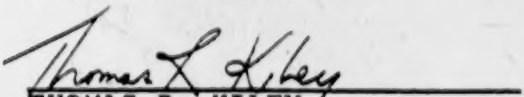
15/ In fact, American's rights may well have been overprotected. In Clover Leaf, 449 U.S. at 464 n. 8, the Court noted the possibility that cases such as this can and perhaps should, be disposed of by summary judgment rather than by allowing a full trial. It cited Vance v. Bradley, 440 U.S. 93, 109-112 (1979) in which the Court had noted that the facts underlying legislative choices need not be proven at trial since the constitutional issue was not the correctness of the legislative findings but whether those facts or assumptions "could not reasonably be conceived to be true." Id. at 111; Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 812 (1976) ("the state is not compelled to verify logical assumptions with statistical evidence."). However here American did have a full trial, and still failed to meet its burden, particularly on the sales tactics in question. B. 11.

CONCLUSION

American's petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL



THOMAS R. KILEY
First Assistant
Attorney General
Counsel of Record

STEPHEN S. OSTRACH
THOMAS A. BARNICO
Assistant Attorneys General
Government Bureau, Rm. 2019
One Ashburton Place
Boston, MA 02108
(617) 727-1033

Dated: August 29, 1983